

NO. 82-1892

Office-Supreme Court, U.S.
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**In the
Supreme Court of the United States**

OCTOBER TERM, 1982

HAYES OILFIELD CONSTRUCTION INC.
Petitioner-appellant

VERSUS

**UNITED STATES FIDELITY
& GUARANTY COMPANY**
Respondent-appellee

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

**1. DID THE COURT OF APPEALS VIOLATE
PETITIONER'S RIGHT TO TRIAL BY JURY?**

**2. DOES THE DECISION OF THE COURT OF
APPEALS WARRANT REVIEW BY THIS COURT?**

STATEMENT OF INTERESTED PARTIES

The parties having an interest in the outcome of this case, pursuant to Rule 21.1(b) of the Rules of the Supreme Court, are listed as follows:

1. Hayes Oilfield Construction, Inc.
2. United States Fidelity & Guaranty Co.

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Respondent, United States Fidelity and Guaranty Company, respectfully requests that this Honorable Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Fifth Circuit in this case. That decision is reported at 693 F.2d 489 (5th Cir. 1982).

JURISDICTION

This Court's jurisdiction is based upon 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The statement of facts set out by the Court of Appeals is correct and is adopted by respondent, United States Fidelity and Guaranty Company. Respondent attaches to this Opposition as Appendix A the Satisfaction of Judgment filed of record by petitioner and respondent on March 17, 1983; as Appendix B the Consent Judgment entered herein by the District Court on March 18, 1983; and as Appendix C a copy of the May 6, 1980 letter from Mr. Bailey to Mr. Allain (filed in the original record below as P-17).

REASONS WHY THIS WRIT SHOULD BE DENIED

The decision of the Court of Appeals in this case does not violate the Seventh Amendment right to trial by jury. The decision involves a question of state law. There are no special or important reasons for this Court to hear this case as the decision by the Court of Appeals herein is not in conflict with decisions of any federal or state court of last resort. The Court of Appeals decided this case on the basis of the entire record before it, not just the selected versions offered by petitioner, and in manner totally consistent with the accepted and usual course of judicial proceedings.

In the final analysis there is simply no reason for this Court to exercise its supervisory power over this case.

Question 1—DID THE COURT OF APPEALS VIOLATE PETITIONER'S RIGHT TO TRIAL BY JURY.

The argument of petitioner fails to track the issues

presented. Apparently as to this issue petitioner selectively argues the facts so as to indicate the result petitioner desires. At the outset, there is no prima facie case of a Seventh Amendment violation just because a jury verdict is reversed. The Federal Rules of Civil Procedure specifically provide a procedure to take cases away from a jury. See Rules 50, 56 and 59.

Appellate courts have authority to reverse jury verdicts on legal grounds. *See generally Galloway v. United States*, 319 U.S. 372, 388-96 (1943); *O'Neill v. Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975); 9 Wright and Miller, *Federal Practice and Procedure*, §2521 at 536 ("The federal courts follow the orthodox doctrine that questions of fact are for the jury and questions of law are for the court.").

In this particular case the threshold legal question was whether the conflict of interest was or was not a justifiable reason for respondent's actions. The Court of Appeals found that the conflict of interest existed between petitioners and respondent (based upon the doubt as to original plaintiff's status, the likelihood that original plaintiff was a longshoreman, the fact that petitioner had no coverage for LHWCA-based claims for the harsh realities under the LHWCA, 33 U.S.C. 900 et seq.) and that, as a matter of law, the refusal to defend as demanded by petitioner was therefore justified.

The facts underlying the conflict of interest were undisputed, the jury could not have found otherwise. There is more than ample authority for the Court of Appeals to rule as it did.

Question 2—DOES THE DECISION OF THE COURT OF APPEALS WARRANT REVIEW BY THIS COURT.

The appeal to the Court of Appeals involved many issues that are not set out in the decision of the Court of Appeals (see 693 F.2d at 494, n. 6).

The conflict of interest defense is a matter of state law. As noted by the Court of Appeals there was no controlling state law that the conflict of interest was *not* a justifiable reason for an insurer to refuse to assume the defense of an insured. 693 F.2d at 492. Petitioner cites no authority that a conflict of interest would not justify a refusal to defend. Rather petitioner attempts to argue that the conflict of issue was "never really presented" at trial (Petition at i). The conflict of interest issue was recognized in the May 6, 1980 letter from Mr. Bailey to Mr. Allain (originally introduced as P-17, a copy is attached as Appendix C). There was no surprise that this issue was raised at trial.

The action by the Court of Appeals was consistent with the accepted and usual course of appellate proceeding. Its decision was based on state law and the record before it. The Court did not find controlling state law and proceeded according to general insurance law. *See generally* 7C J. Appleman, Insurance Law and Practice, §§ 4682-686 (W. Berdal ed. 1979).

The issue of conflict of interest was not disposed of by summary judgment as the question of LHWCA coverage was not considered or decided by the District Court. The Court of Appeals correctly analyzed the policy and applicable law to find that petitioner was uninsured

for LHWCA coverage. See 693 F.2d at 494. Petitioner cites *Parker v. South Louisiana Contractors, Inc.*, 537 F.2d 113 (5th Cir. 1976), and *Russell v. Atlantic and Gulf Stevedores*, 625 F.2d 71 (5th Cir. 1980), for the proposition that an LHWCA based claim for damages for failure to secure compensation is covered by the policy. Those cases hold that the lower court's jurisdiction is based on its admiralty jurisdiction and that the LHWCA does not provide a separate and independent basis for jurisdiction. Those cases do not convert claim for damages under the LHWCA to a claim covered by a policy of insurance that excludes claims under workmen's compensation policies. The LHWCA based claim is excluded from coverage and the conflict of interest is a real problem that was avoided only upon the settlement of the original plaintiff's claim.

The argument presented to this court by petitioner shows the conflict of interest recognized by the Court of Appeals. There was no basis to submit the issue of punitive damages to the jury.

CONCLUSION

The petitioner lost a windfall and now complains to this Court. All claims between petitioner and respondent have been concluded and settled (see Appendices A and B). All that remains is for this Court to deny certiorari. Defendant respectfully prays that the petition for certiorari be denied.

Respectfully submitted:

CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY

By: _____
CHARLES L. CHASSAIGNAC
J. FRANCOIS ALLAIN
1500 First N.B.C. Building
New Orleans, Louisiana
70112-1790
Telephone: (504) 568-1320

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari have been served upon B. Ralph Bailey, counsel for Hayes Oil Field Construction, Inc., at his post office address of 3445 N. Causeway Blvd., suite 801, Metairie, Louisiana, 70002, by placing same in the United States mail, first-class postage prepaid.

By: _____
CHARLES L. CHASSAIGNAC
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1500 First N.B.C. Building
New Orleans, Louisiana
70112-1790
Telephone: (504) 568-1320

APPENDIX "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONNIE EZELL

CIVIL ACTION

VERSUS

NUMBER 78-1813

HAYES OILFIELD
CONSTRUCTION, INC., ET AL

SECTION "K"

SATISFACTION OF JUDGMENT

WHEREAS, Hayes Oilfield Construction, Inc. and USF&G have fully satisfied the terms and conditions of the attached Consent Judgment, and recognizing Hayes Oilfield Construction, Inc.'s right to appeal the judgment of the Court of Appeals as set forth in the attached Consent Judgment;

The docket may now be marked "Satisfied" with respect to the claims of Hayes Oilfield Construction, Inc. and USF&G as set forth in the attached Consent Judgment.

/S/J. FRANCOIS ALLAIN

CHARLES L. CHASSAIGNAC

J. FRANCOIS ALLAIN

CHAFFE, McCALL, PHILLIPS,

TOLER & SARPY

1500 First N.B.C. Building

New Orleans, LA 70112

Attorneys for USF&G

/S/B. RALPH BAILEY

B. RALPH BAILEY
KENDALL P. GREEN
BAILEY & LEININGER
3445 N. Causeway Blvd., Suite 605
Metairie, LA 70002
504-833-8241
Attorneys for Hayes Oilfield
Construction, Inc.

CERTIFICATE

I do hereby certify that I have on this 10 day of March, 1983, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid.

/S/B. RALPH BAILEY

APPENDIX "B"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONNIE EZELL

CIVIL ACTION

VERSUS

NO. 78-1813

HAYES OILFIELD
CONSTRUCTION, INC., ET AL

SECTION "K"

CONSENT JUDGMENT

Considering the attached Consent Judgment entered into by both Hayes Oilfield Construction, Inc. and United States Fidelity & Guaranty Company, it is hereby ordered, adjudged and decreed that:

1) USF&G is liable to Hayes Oilfield Construction, Inc. for those attorney's fees and costs which were previously stipulated between the parties and which were awarded by the jury, plus interest thereon, in the amount of \$23,093.54;

2) Hayes Oilfield Construction, Inc. is liable to USF&G for its costs of appeal in the amount of \$4,207.71;

3) The balance due and owing Hayes Oilfield Construction, Inc. is \$18,885.83;

4) Hayes Oilfield Construction, Inc. specifically retains its right to appeal the judgment of the Court of Appeals, excluding that portion of the judgment set forth in Number 1 above.

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THUS DONE AND PASSED this 18th day of
March, 1983 at New Orleans, Louisiana.

/S/GEORGE ARCENEUX
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

Law Offices
BAILEY & LEININGER
3445 N. Causeway Blvd., Suite 605
Metairie, Louisiana 70002
Telephone (504) 833-8241

May 6, 1980

Mr. J. Francois Allain
Chaffe, McCall, Phillips, Toler & Sarpy
1500 First National Bank of Commerce Bldg.
New Orleans, Louisiana

RE: Ronnie Ezell vs. Hayes Oil
 Field Construction Co., Inc.
 Our File No. 79-B-0182

Dear Frank:

This will confirm our discussion on May 6, 1980 following the preliminary conference at which time you advised that USF&G will not assume the defense of Hayes Oil Field Construction Co., Inc. in this matter, despite the ruling of the court that there is coverage provided by your policy of insurance.

You informed me that it was your position that the plaintiff's claim for damages under the Longshoreman's & Harbor Workers' Compensation Act, should there be a finding that plaintiff was not a seaman, is *not* covered by your policy and that the court's recent ruling with respect to coverage did not adjudicate that question.

As I informed you, our motion for summary judgment was for a ruling "holding that the claim for damages

in the main demand was covered by the policy of insurance written by USF&G'', and the second paragraph of our memorandum in support of counter motion for summary judgment clearly sets forth that our motion covered both of plaintiff's claims for damages under the Jones Act or, in the alternative, under the LSHWCA. Accordingly, it is our position that the court has already ruled that there is coverage for both of plaintiff's claims for damages so that any question on this point has already been adjudicated.

Mr. J. Francois Allain

Page Two

May 6, 1980

You further advised that you additionally would not assume Hayes' defense because USF&G may make claim against Hayes to recoup compensation and medical benefits which USF&G paid under the Mississippi Workman's Compensation Statute, allegedly due to Hayes' false assertion that the claim occurred in Mississippi rather than in Louisiana.

Since you refuse to defend the allegations by the plaintiff, which we believe the court to have already held are covered by your policy, we have no alternative but to continue with Hayes' defense, the costs of which Hayes expects to be reimbursed for should we be successful in proving the existence of coverage. In the interim, we still demand that USF&G assume the defense of Hayes, indemnify them and take no action adverse to the best interests of Hayes.

Since you agree USF&G has coverage for the claim under the Jones Act, but deny you have coverage for the claim for damages under the LSHWCA, we do not believe

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it is in the best interest of Hayes for USF&G to join with Marion and seek to dismiss plaintiff's claim under the Jones Act on the grounds that plaintiff is not a seaman. We believe that to do so will breach USF&G's previous agreement to defend Hayes under a reservation of rights.

Sincerely,

B. Ralph Bailey